

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

TX 2007-000073

03/13/2008

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT  
S. Brown  
Deputy

BIENESTAR APARTMENTS LLC

PATRICK DERDENDER

v.

CITY OF SAN LUIS

MICHAEL G GALLOWAY

**UNDER ADVISEMENT RULING**

(Plaintiff's Motion To Dismiss Counterclaim Rule 12(B)(6))

As to the technical question of whether a statute of limitations objection correctly falls under subsection (1) or (6) of Rule 12(b) A.R.C.P., the Rule itself states, "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion." Even if this issue correctly falls under subsection (1), it is not waived merely by captioning the motion under subsection (6).

SLCC § 7A-575(c) provides, "An action for judicial review cannot be commenced by either the taxpayer or the Tax Collector more than thirty (30) days after receipt by the taxpayer of notice of any refund or assessment recalculated or reduced to conform to the Hearing Officer's decision, unless the time to commence such an action is extended in writing signed by both the taxpayer and the Tax Collector. Failure to bring the action within thirty (30) days or such other time as is agreed upon in writing shall constitute a waiver of any right to judicial review, except as provided in subsection (g) below." (It does not appear that any writing extending the deadline exists, so the default period of thirty days applies.) Subsection (g) states, "After the initiation of any action in the appropriate court by either party, the opposing party may file such counterclaim as would be allowed pursuant to the Arizona Rules of Civil Procedure." This subsection provides the party a grace period once it learns that the opposing side has filed suit. The issue is how long that grace period is.

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Plaintiff argues, and Defendant does not contest, that this is a permissive rather than a compulsory counterclaim. To the extent the distinction is material, it works in Defendant's favor. Old (pre-Rule 13(f)) case law, never formally overruled, holds that a compulsory counterclaim not raised in the Answer is waived. *See, e.g., Keystone Copper Mining Co. v. Miller*, 63 Ariz. 544, 556 (1945). (Later cases, though, have departed from the rigor of the rule, even without the availability of Rule 13(f) relief. *See Adams v. Bear*, 87 Ariz. 288, 292-93 (1960); *Schatt-Ajax Industries v. Churchill*, 3 Ariz.App. 34, 38 (1966).) No such requirement exists for permissive counterclaims. The requirement of Rule 12(a)(1)(A) that the Answer be filed within twenty days of service therefore does not impose a bar on subsequently filed permissive counterclaims. For both compulsory and permissive counterclaims, however, the Rules now provide a remedy when the counterclaim is not timely brought. Rule 13(f) (added in 1987) permits the Court to grant leave to add the counterclaim by amendment when the pleader shows oversight, inadvertence, or excusable neglect, or when justice requires. If the Court grants leave, then the counterclaim is "allowed pursuant to the Arizona Rules of Civil Procedure." *State ex rel. Arizona Dept. of Revenue v. Capitol Castings, Inc.*, 193 Ariz. 89 (App. 1998), is not helpful, as its holding is based on very different state statutes, which establish a timetable independent of the Rules of Civil Procedure.

Therefore, IT IS ORDERED Plaintiff's Motion To Dismiss Counterclaim (Rule 12(B)(6) is denied.